

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)

Implementation of)
Video Description of)
Video Programming)
)

MM Docket No. 99-339

COMMENTS OF A&E TELEVISION NETWORKS

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EXECUTIVE SUMMARY

A&E Television Networks ("AETN"), an independent cable programmer offering the A&E Network, The History Channel, The BIOGRAPHY® Channel and History Channel International™, respectfully urges the Commission to reconsider its proposal to implement rules for video descriptions. While AETN applauds the goal of making television more accessible to persons with visual disabilities, as well as the ongoing experiments into the innovative use of video descriptions, the proposed imposition of video description obligations raises serious statutory, constitutional, and economic and technical concerns.

First, the Commission lacks statutory authority to adopt and enforce the proposed regulations. Section 713 of the Communications Act of 1934, as amended, 47 U.S.C. § 713 ("Act"), authorizes the Commission to conduct inquiries into both closed captioning and video description, but empowers the Commission to adopt regulations only with regard to closed captioning. Section 713's clear intent, which is reinforced by legislative history reflecting that Congress explicitly considered – but rejected – authorizing video description requirements, cannot be overridden by general enabling provisions or other grants of authority within the Act. This is particularly true given that the Commission's power to regulate cable is strictly limited to that ancillary to its statutory authority to regulate broadcasting.

Second, unlike closed captioning, which requires only that already-scripted material be presented visually as well as aurally, video descriptions require the preparation of a "second script" raising creativity and copyright issues, along with significant constitutional compelled speech concerns. Moreover, Commission attempts

to regulate the content of cable programming networks, either directly or by proxy, must face heightened sensitivity to constitutional issues that may not be implicated by the Commission's regulation of over-the-air broadcasting.

Finally, it would be premature for the Commission to impose and enforce video description requirements. Video description is a developing service that faces many obstacles before it can become successful, and the industry has had only limited experience with the service. Moreover, the proposed rules would impose a disproportionate burden on cable networks, the economics of which are vastly different from the large broadcast networks. Mandatory multiple audio tracks to accommodate video descriptions would also impose significant challenges to cable networks like AETN.

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A&E Television Networks ("AETN"), by counsel and pursuant to the Notice of Proposed Rulemaking in the captioned proceeding, 1/ hereby offers comments on the Commission's proposal to require video programmers to provide video descriptions to make television programming more accessible to persons with visual disabilities.

AETN is a cable programmer that is neither owned nor controlled by any cable operator. It offers the A&E Network ("A&E"), The History Channel, The BIOGRAPHY® Channel and History Channel International™. A&E is among the most well-known and established cable programming services and currently is available in approximately 76 million television households throughout the country via cable, TVRO, MMDS, DBS, and SMATV distribution systems. 2/ The network features critically acclaimed original entertainment programming, including mysteries, dramatic and

1/ *Implementation of Video Description of Video Programming*, MM Docket No. 99-339, Notice of Proposed Rulemaking, FCC 99-353 (rel. Nov. 18, 1999) ("*Notice*" or "*NPRM*").

2/ See Paul Kagan Associates, Inc., CABLE PROGRAM INVESTOR at 10 (January 20, 2000). This represents more than 93 percent of homes that receive multichannel television service in the United States. Paul Kagan Associates, Inc., CABLE PROGRAM INVESTOR at 14 (March 15, 1999).

documentary programs and specials. Over 80 percent of A&E's prime time schedule consists of original productions.

The History Channel, which launched in 1995, is a unique, high-quality programming service featuring historical documentaries, movies and miniseries placed in historical perspective. Audiences have responded to the quality nature of the programming: History now has over 61 million subscribers. ^{3/} History is noted for its original programming. Currently, 75 percent of the prime time schedule consists of original programming -- an increase of 88 percent since 1997. The BIOGRAPHY® Channel and History Channel International were launched in 1998. The BIOGRAPHY® Channel is a twenty-four (24) hour a day service distributed digitally and consisting of documentaries, movies and informational programming, History Channel International is a twenty-four (24) hour a day service, also distributed digitally, consisting of historical movies and informational programs concerning international historical topics, including mini-series, interstitial information, and documentaries.

AETN applauds the ongoing experiments into the use of video description as an innovative method of presenting video programming for persons with visual disabilities. In this regard, the experience with the use of video description by PBS, as well as by commercial networks such as Turner Classic Movies and Kaleidoscope Television, will provide important information about this programming

^{3/} See Paul Kagan Associates, Inc., CABLE PROGRAM INVESTOR at 10 (January 20, 2000).

format. ^{4/} However, the fact that a method of presenting programming is praiseworthy does not suggest that it is the appropriate subject of federal mandates, or that the limited experience to date provides a sufficient basis for proposing such policies. It is far from clear that the circumstances support a general mandate for video description.

I. BACKGROUND

In this proceeding, the Commission is considering adopting rules that would require programmers to include video descriptions in their programs to assist persons with visual disabilities. The descriptions insert narrations of settings and actions not otherwise reflected in dialogue into TV programs, such as the movement of persons in the scene. They are typically transmitted through the Secondary Audio Programming (SAP) channel and are audible only when that channel is activated using a television or VCR with SAP capability.

As initially proposed, the rules would impose programming requirements on commercial television broadcasters in the top 25 television markets. *Notice* at ¶ 20. The *Notice* seeks comment on a proposal that the initial video description rules require that broadcast network affiliates in the top 25 television markets provide a minimum of 50 hours per calendar quarter (roughly four hours per week) of described prime time and/or children's programming no later than 18 months from the effective date of the rules. The *Notice* also seeks comment on requiring larger video programming distributors to carry the described programming of the broadcasters affiliated with the

^{4/} These early experiments with video description are described in the *NPRM*. The Commission notes that all of the existing video description efforts are supported with public funding. *Notice* at ¶ 2.

top 4 networks, as well as that of nonbroadcast networks that reach 50% or more of multichannel video programming distributor (MVPD) households. *Id.* The *NPRM* proposes applying the rules eventually to all video programming distributors, including TV broadcast stations, cable operators, direct broadcast satellite (DBS) operators, home satellite dish providers, open video system (OVS) operators, satellite master antenna television (SMATV) operators, and wireless cable operators using multichannel multipoint distribution service (MMDS) channels. *Id.* at ¶ 24.

In short, the Commission proposes eventually to impose video description requirements on “all distributors of video programming over which we have jurisdiction.” *Id.* Although the Commission does not exert direct regulatory control over programming networks such as those provided by AETN, it proposes to hold distributors responsible “for ease of enforcement and monitoring of compliance.” *Id.* at ¶ 25. This, it acknowledges, would mean that “programming networks, and not broadcasting stations and MVPDs, will actually describe the programming,” *id.*, and that the primary burden of compliance will fall on the programmers.

The proposed video description rules are generally modeled after the existing closed captioning rules, but because video description technology is not as developed as closed captioning technology, the *Notice* stated that the Commission would proceed incrementally to implement video description requirements. In pursuing its goal of increasing the amount of video description of video programming, the Commission is seeking to avoid placing “an undue burden on distributors,” *id.* at ¶ 40, and proposes to begin with only the largest broadcast stations “and programming networks that are better able to bear the costs involved.” *Id.* at ¶ 25. Nevertheless, it

described the initial rules as “a starting point for further development of the service,” and anticipated that “[t]he experience of the largest programming distributors will provide . . . concrete information upon which to propose a schedule to phase in other distributors.” *Id.* at ¶ 28.

II. THE COMMISSION LACKS STATUTORY AUTHORITY TO ADOPT THE PROPOSED VIDEO DESCRIPTION RULES

A major question posed by the Notice is whether the Commission has jurisdiction to require video description mandates. The NPRM asks commenters to address whether the FCC possesses statutory authority to adopt video description requirements, and whether whatever authority it may have varies based on the type of video programming provider to which the new rules may apply. *NPRM* at ¶¶ 13, 34.

The Notice suggests that statutory authority may exist in two principal areas. First, the *NPRM* states that Section 713(f) of the Telecommunications Act demonstrates a “general legislative preference for the increased accessibility of certain communications services for persons with disabilities” that is “potentially relevant” to its mandate. *Id.* at ¶ 38 (*citing* 47 U.S.C. § 713(f)). Second, the Notice seeks to find authority to adopt video description rules in the Communications Act’s general public interest mandate, the FCC’s general authority to make rules, its jurisdiction over “all interstate and foreign communication by wire or radio” and its mandate “to make available, so far as possible, to all the people of the United States . . . a rapid, efficient,

Nation-wide, and world-wide wire and radio communication service.”^{5/} However, as explained below, the Commission lacks statutory authority for its proposed rules.

A. Section 713 Provides No Authority to Impose Video Description Obligations

Considering the whole of Section 713 – which deals with "video programming accessibility" generally, and closed captioning and video descriptions specifically – it is clear that Congress did not authorize the Commission to prescribe video description regulations of any kind. Section 713(a) required the Commission to complete a closed captioning inquiry and to report its findings to Congress within a given time frame.^{6/} Sections 713(b) and (c) required the Commission to prescribe closed captioning regulations and compliance deadlines.^{7/} Similarly, Section 713(f) required the Commission to commence a video description inquiry and report its findings to Congress. Unlike the closed captioning provisions, Section 713 contains no provision whatsoever for FCC-prescribed video description rules.

It is a well-established principle of statutory interpretation that where a statute provides authority for an action, and is completely silent as to a similar, related action, the statute must be interpreted as authorizing only the former and not the latter.^{8/} Such is the case here: Section 713 requires the Commission to conduct both

^{5/} *Id.* at ¶¶ 35-37 (*citing* 47 U.S.C. §§ 152(a), 154(i), 303(r), 225, 303(u), 710, 508, 309(a), 307(c)(1), 310(d)).

^{6/} 47 U.S.C. § 713(a).

^{7/} 47 U.S.C. §§ 713(b)-(c).

^{8/} *Original Honey Baked Ham Company v. Glickman*, 172 F.3d 885, 887 (D.C. Cir. 1999) ("A statute listing the things it does cover exempts, by omission, the things it does

closed captioning and video description inquiries and report the findings to Congress. But, Section 713 requires the Commission to prescribe only closed captioning regulations and is silent regarding prescription of video descriptor regulations. Thus, Section 713(f) must be read as not authorizing the Commission to prescribe the video description regulations proposed in the *NPRM*. 9/

This conclusion is confirmed by Section 713's legislative history. Rather than authorizing or requiring rules to implement video descriptions, Congress consciously authorized the FCC only to conduct an inquiry into the use of video descriptions on video programming and to report its findings. The House version of the bill had provided that, following the inquiry into video descriptions, the FCC could adopt regulations it deemed necessary to promote the accessibility of video programming to persons with visual impairments. But this authorization for FCC action was not adopted, and the Conference Report noted that the final legislation deleted the House provision

not list. As to the items omitted, it is a mistake to say that Congress has been silent. Congress has spoken – these are matters outside the scope of the statute.") (*citing Engine Mfrs. Assn. v. EPA*, 88 F.3d 1075, 1088 (D.C. Cir. 1996) (if the text of a statute clearly requires a particular outcome, then the mere fact that it does so implicitly rather than expressly does not mean that it is "silent" in the *Chevron* sense) (*citing Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984))).

9/ This view is reinforced by the fact that Section 303(u) of the Act, 47 U.S.C. § 303(u), authorizes the Commission to "[r]equire that apparatus designed to receive television pictures broadcast simultaneously with sound be equipped . . . to display closed-captioned television transmissions," but it does not authorize the Commission to require any equipment changes associated with video description. Similarly, the *NPRM*'s reference to Sections 225 and 710, which require FCC action to facilitate use of certain equipment within the Commission's regulatory purview by hearing- and speech-impaired individuals, in no way supports the Commission's attempt here to make video programming more accessible to the visually-impaired.

referencing Commission rulemaking authority with respect to video description. ^{10/} Congress clearly considered authorizing the Commission to craft video description regulations, but expressly declined to do so. Thus, the provision as ultimately adopted was not intended to authorize the Commission to require video description rules. ^{11/}

B. The Act's Grants of General Authority Do Not Empower the Commission to Adopt Video Description Regulations

Not only does the unambiguous legislative intent of Section 713 foreclose FCC authority to adopt video description rules, the Act precludes a generalized assertion of a programming mandate, at least with respect to cable television. Section 624(f) of the Cable Act expressly provides that “any Federal agency . . . may not impose requirements regarding the provision or content of cable services, *except as expressly provided in this title.*” ^{12/} Here, the *Notice* essentially acknowledges that no express mandate for video description exists, but instead purports to find authority under the Commission’s general statutory powers or as a matter of ancillary jurisdiction.

^{10/} S. Conf. Rep. No. 230, *reprinted in* 1996 U.S.C.A.A.N. 1, 197 (“The conference agreement adopts the House provision with modifications which . . . delete[] the House provision referencing a Commission rulemaking with respect to video description.”).

^{11/} See *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion.”); see also *Reno v. ACLU*, 521 U.S. 844, 871 (1997).

^{12/} 47 U.S.C. § 544(f)(1) (emphasis added).

The general enabling provisions of the Act listed in the *NPRM* do not confer substantive authority on the Commission to regulate programming content. ^{13/} It is well-established that "[t]hough afforded wide latitude in its supervision over communication by wire, the Commission was not delegated unrestrained authority." ^{14/} In particular, Congress "restricted the Commission's ability to advance objectives associated with public access [to communications] at the expense of the journalistic freedom of persons engaged in broadcasting" and cable. ^{15/}

Nor may the Commission conjure programming mandates for cable television under an assertion of ancillary jurisdiction. In *U.S. v. Southwestern Cable Co.*, ^{16/} the Supreme Court established the paradigm for FCC regulation of cable such that the Commission's jurisdiction extends only as far as regulating to the extent "reasonably ancillary [to its] responsibilities for the regulation of television broadcasting." ^{17/} Following this analysis, the Supreme Court invalidated an attempt by the Commission to impose leased access requirements on cable operators. ^{18/} Under this same reasoning, the Commission may not impose video descriptions on cable video programmers unless such rules are necessary to further the Commission's

^{13/} See *Brown & Williamson Tobacco Co. v. FDA*, 153 F.3d 155, 160-161 (4th Cir. 1998), *cert. granted*, 119 S. Ct. 1495 (1999).

^{14/} *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979).

^{15/} *Id.* at 707.

^{16/} 392 U.S. 157, 178 (1968).

^{17/} *Id.*

^{18/} *FCC v. Midwest Video Corp.*, 440 U.S. at 708-709.

regulatory oversight of, and the imposition of regulations on, broadcast programmers. But as established above, the Commission lacks authority to impose video description regulations generally, even as to broadcasters. Thus, the Commission also lacks authority to impose such regulations on cable programmers.

Yet even if the Commission had jurisdiction over broadcasters in this regard, it would not justify extending such control over cable networks. This conclusion is supported by the Commission's own analysis of ancillary jurisdiction over information services. In a footnote, the Commission alludes to its use of its ancillary jurisdiction to sweep two information services – voicemail and interactive menus – within its Section 255 requirements that make telecommunications services and equipment usable by individuals with disabilities, and suggests that the same principles may apply here. 19/ In the *Section 255 Order*, however, the Commission relied on a direct congressional mandate to make telecommunications services accessible, 20/ and it also based its claim of authority on its well-established subject matter jurisdiction over information services offered by Title II common carriers. 21/

The situation is quite different in the context of imposing video description requirements on cable programmers, however. The Commission has no long-standing

19/ *NPRM* at ¶ 36 n.78 (citing *Implementation of Sections 255 and 251(a) of the Communications Act*, WT Docket No. 96-198, Report and Order and Further Notice of Inquiry, FCC 99-181, ¶¶ 93-98 (Sept. 1999) ("*Section 255 Order*").

20/ In particular, the Commission noted that the information services regulated in the *Section 255 Order* are "essential to the ability of persons to effectively use telecommunications," and that the Commission was statutorily ordered to adopt guidelines to advance. *Section 255 Order* at ¶¶ 93, 97.

21/ *Id.* at ¶ 95.

regulatory power over cable content – in fact, as noted above, FCC jurisdiction over cable content is quite limited. Moreover, while Congress ordered the Commission to adopt guidelines for access to telecommunications equipment and services by individuals with disabilities (as Congress also did for closed captioning), Congress *expressly refrained* from requiring or allowing the Commission to adopt regulations or guidelines for video description. 22/ Moreover, in the *Section 255 Order*, the Commission declined to extend the accessibility obligations to information services other than voicemail and interactive menus, recognizing that its jurisdiction extended only to "those services we find essential to making telecommunications services accessible" and not to "information services [that] do not have the potential to render telecommunications services themselves inaccessible." 23/ Following this logic, the maximum reach of ancillary jurisdiction might extend to broadcast programming that is carried on cable television systems but not to cable programming services.

22/ See *supra* note 10. For much the same reason, the Commission's second-step analysis in the *Section 255 Order* – that voicemail and interactive menus are so integral to the use of telecommunications services that, if inaccessible and unusable, the underlying telecommunications services that section 255 sought to make available will not be accessible to persons with disabilities in a meaningful way, *Section 255 Order* at ¶ 99 – is inapposite here because, again, unlike Section 255, Section 713 does not enable the FCC to do more than conduct an inquiry into video descriptions.

23/ *Section 255 Order* at ¶ 108. The Commission noted that information services other than voicemail and interactive menus are really alternatives to telecommunications services unessential to the effective use of telecommunications services, explaining that, "[f]or example, e-mail, electronic information services, and web pages are alternative ways to receive information which can also be received over the phone using telecommunications services [while] inaccessible and unusable voicemail and interactive menus operate in a manner that can render the telecommunications service itself inaccessible and unusable."

C. The Commission's Statutory Mandate Must be Interpreted Narrowly to Avoid First Amendment Conflicts

Even if the Communications act plausibly could be construed to empower the Commission to adopt video description requirements, settled rules of statutory construction counsel against the interpretation set forth in the *Notice*. It is well-established that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." ^{24/} Here, the Commission's proposed rules would raise serious constitutional problems for at least two reasons.

First, as the Commission recognized in its *Report on Video Programming Accessibility*, any requirement for video description would necessitate "the development of a second script, which raises creativity and copyright issues" ^{25/} which necessarily raises questions of compelled speech. Just as the First Amendment limits the government's ability to restrict what a person can say, it also prevents the government

^{24/} *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575-576 (1988). See *Rust v. Sullivan*, 500 U.S. 173, 190-191 (1991); *International Union, United Auto., Aerospace & Agricultural Implement Workers of Am., UAW v. OSHA*, 938 F.2d 1310, 1317 (D.C. Cir. 1991) ("In effect we require a clear statement by Congress that it intended to test the constitutional waters."); *Marshall v. Gibson's Prods.*, 584 F.2d 668, 675-76 (5th Cir. 1978) ("longstanding rule of statutory construction teaches that the expression of certain powers implies the exclusion of others, and invocation of this rule is particularly appropriate . . . where its application is consistent with the recognition that Congress . . . perhaps omitted a provision . . . to avoid conflict with the Constitution").

^{25/} *In the Matter of Closed Captioning and Video Description of Video Programming*, MM Docket No. 95-176: *Implementation of Section 305 of the Telecommunications Act of 1996*, 11 FCC Rcd. 19214, 19221-22 (1996) ("*Report on Video Programming Accessibility*").

from forcing a speaker to communicate. As the Supreme Court has emphasized, “[s]ince *all* speech inherently involves choices of what to say and what to leave unsaid,’ one important manifestation of the principle of free speech is that one who chooses to speak may also decide ‘what not to say.’” 26/ The Court has made clear that “the First Amendment guarantees ‘freedom of speech’ . . . necessarily compris[es] the decision of both what to say and what *not* to say.” 27/ The Court has rejected the argument that the government may compel statements of fact rather than opinion, noting that “either form of compulsion burdens protected speech.” 28/

In addition to the compelled speech question, any attempt by the Commission to regulate the content of cable programming networks, either directly or by proxy, raises significant First Amendment questions. The Supreme Court has made clear that, absent the “special characteristics” of the broadcast medium, *i.e.*, its use of the limited radio spectrum, content controls are subject to strict First Amendment scrutiny. In *Turner Broadcasting System v. FCC*, 29/ the Court stated categorically that “the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation.” Noting the “fundamental technological differences

26/ *Hurley v. Irish-American Gay Group of Boston*, 515 U.S. 557, 573 (1995) (emphasis in original) (quotation omitted).

27/ *Riley v. National Federation of the Blind of N.C., Inc.*, 487 U.S. 781, 796-797 (1988); see also *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (“[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.”).

28/ *Riley*, 487 U.S. at 797-798.

29/ 512 U.S. 622, 637 (1994).

between broadcast and cable transmission,” the Court found that application of “the more relaxed standard of scrutiny adopted in *Red Lion* and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation.” ^{30/} Where, as here, a statutory interpretation that takes an expansive view of Commission authority over cable programming would raise serious constitutional questions, reviewing courts would accord the FCC little deference. In this circumstance, the Commission should not seek to expand its jurisdiction to include cable networks.

III. IT IS PREMATURE TO ESTABLISH A MANDATE FOR VIDEO DESCRIPTION

A. There is Insufficient Experience With Video Description to Support a Rule

The Commission has previously found that a host of technical, economic and practical considerations make any mandate for video description premature. Its *Report on Video Programming Accessibility* found that “video description is presently a developing service that faces many obstacles before it can become more accessible.” ^{31/} In particular, the Commission found that the general accessibility of video description “is dependent on the resolution of certain technical, legal, funding and cost issues,” and that “[a]ny schedule for expanding the use of video description would depend, in part, on implementation of advanced digital television.” ^{32/} Accordingly, it concluded that “[t]he present record on which to assess video description . . . is limited”

^{30/} *Id.* at 639.

^{31/} 11 FCC Rcd. 19214, 19221-22.

^{32/} *Id.* at 19222.

and that “the best course is for the Commission to continue to monitor the deployment of video description and the development of standards for new video technologies that will afford greater accessibility of video description. 33/ Similarly, in its 1997 Report to Congress on Video Competition, the Commission found that any schedule for expanding the use of video description depends, in part, on implementation of advanced digital television, and that, in the current analog environment, SAP channel capacity is a limited resource and video description must compete with other possible uses of the SAP channel. 34/ Accordingly, it called for “a period of trial and experimentation” with respect to video description. 35/

Nothing has occurred since these reports were issued that supports a change in these conclusions. To put the question into perspective, broadcasters and cable operators had accumulated almost three decades of experience with closed captioning before Congress authorized the FCC to adopt captioning rules. Here, there is far less experience with video description, which may explain why Congress empowered the Commission to conduct a study, but not to establish a mandate. In the *1997 Video Competition Report*, the Commission noted that the advances of digital transmission plus continued federal funding might accelerate the development of video

33/ *Id.*.

34/ *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd. 1034, 1067 (1998) (“*1997 Video Competition Report*”).

35/ *Id.* at 1170.

description, but stopped short of proposing mandates. ^{36/} A similar conclusion is warranted here.

B. The Proposed Rules Would Impose a Disproportionate Burden on Cable Networks

The Commission's proposal fails to take into account the Act's concern for the economic impact of any accessibility requirements. Thus, while Section 713(a) directed the Commission to adopt an implementation schedule for closed captioning, both the statutory text and the legislative history directed the FCC to give due regard to the impact of such obligations on programming networks. Section 713 expressly codifies the Commission's historic approach that recognizes the economic concerns affecting different programming services. Thus, while Sections 713(b) and (c) empowered the Commission to establish rules for captioning to be included in video programming, Section 713(d)(1) calls upon the Commission "by regulation" to exempt from any captioning schedule "programs, classes of programs, or services" for which "closed captioning would be economically burdensome to the provider or owner of such programming." 47 U.S.C. § 713(d)(1).

The legislative history of Section 713 emphasized repeatedly the need to balance the benefits of increased accessibility against economic realities. The Conference Report recognized "that the cost to caption certain programming may be prohibitive given the market demand for such programs and other factors," and went on to note that "the Committee does not intend that the requirement for captioning should result in . . . previously produced programming not being aired due to the cost of the

^{36/} *Id.*

captions.” 37/ The Conference Report also recognized this tension by directing the Commission to “balance the need for closed captioned programming against the potential for hindering the production and distribution of programming.” 38/ Based on this congressional balancing of public interest factors, the Commission should apply the same considerations to video descriptions.

The Commission’s most recent report on video description found that “the costs of providing video description are substantial” and “significantly higher than those associated with closed captioning.” 39/ As NCTA reports in its comments in the instant proceeding, the production cost alone for creating four hours of described programming per week would amount to \$700,000 per network, and there would be many other costs as well. 40/ Such costs would have a disproportionate impact on cable networks, such as those provided by AETN.

However, the Commission’s proposal for video description fails to consider these economic factors and the *Notice* incorrectly equates broadcast networks and programming networks that serve over 50% of MVPD households as entities “that are better able to bear the costs involved” with a video description mandate. *Notice* at ¶ 25. This analysis does not take into account the significant differences in the economics of broadcast versus cable networks, and the greater impact a video description rule would

37/ H.R. REP. NO. 204, 104th Cong., 1st Sess. (1995).

38/ Telecom Act, Joint Explanatory Statement of the Committee of Conference at 183.

39/ 1997 *Video Competition Report*, 13 FCC Rcd. at 1169.

40/ See Comments of NCTA at 10-11.

have on cable programmers like AETN. The economics driving the cable industry differ significantly from those of broadcast network television. Cable networks could not survive on advertising revenue alone, but depend on support from their affiliates. The ratings achieved by cable networks such as A&E -- which averaged a 1.31 prime-time rating in November 1999 -- are on an entirely different scale from broadcast networks. ^{41/} Cable networks simply cannot support the same overhead costs as an established broadcast network, which generally has a standard average prime time rating over 8, and a rating of around 14 for the most popular programs. ^{42/} This difference is crucial, since a single ratings point may be worth \$100 million in advertising revenue to a broadcast network over the course of a season. ^{43/} Fairness, as well as the mandate of Section 713, demands that video description costs should not be considered in the abstract, but assessed in relation to the audience served and the comparative economic burdens.

The differences in scale between broadcast and cable networks are also evident in overall programming budgets. The average major broadcast network spends more than \$2.25 billion on programming annually, ^{44/} a sum than cannot be compared to the resources available to cable networks. These figures demonstrate that the

^{41/} Paul Kagan Associates, Inc., CABLE PROGRAM INVESTOR at 10 (January 20, 2000).

^{42/} See Paul Kagan Associates, Inc., TV PROGRAM INVESTOR at 8-9 (June 21, 1999). See also *People's Choice: Ratings According to Nielsen, Feb. 5-11*, Broadcasting & Cable, Feb. 19, 1996, at p.24

^{43/} *In the Matter of the Syndication and Financial Interest Rules*, 6 FCC Rcd. 3094, 3182 (Sikes, C., dissenting) (1991).

^{44/} Paul Kagan Associates, Inc., TV PROGRAM INVESTOR at 3 (April 21, 1998).

network broadcasting business is based on an entirely different scale and economic structure than applies to a cable programming network. The four major broadcast networks, for example, spend more on prime time programming in two weeks than does a cable network the size of A&E Television or The History Channel in the course of a year. Moreover, such costs are covered by much greater revenues, because of the differences in ratings and advertising rates. Accordingly, the economic effect of video description requirements would be very different for a cable network than for a broadcast network.

In addition to economic burdens, a video description requirement would impose various technical difficulties. ^{45/} Specifically, with respect to AETN's networks, a video description requirement would cause significant technical problems. The current playbacks for A&E Television and The History Channel do not support the signal routing of the additional audio, but will only support the routing of stereo sound. Multiple mandatory audio tracks also would affect adversely AETN's digital compression system. Because each audio track must have data bits allocated to it, and video description mandate would steal bits from other elements in the transmission stream, such as the video. This would cause a reduction in picture quality. For these reasons, among others, the Commission should not attempt to impose video description requirements.

IV. CONCLUSION


As the Commission has noted previously, "[c]ontinued public funding could foster the development of video description services to the point where widespread

^{45/} See *generally* Comments of NCTA at 12-18.

implementation of video description could become feasible," and that this could lead to the creation of a commercial market for video description services independent on any government mandates. 46/ The Commission's prior conclusion more accurately reflects the significant difficulties inherent in seeking to require the adoption of what currently is an experimental programming format. For the foregoing reasons, AETN respectfully urges the Commission to reconsider its proposal to implement rules for video descriptions.

Respectfully submitted

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46/ 1997 Video Competition Report, 13 FCC Rcd. at 1170.